

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SYLVIA G. NIXON**

Claimant

VS.

**MUSTANG, INC.**

Respondent

AND

**TRAVELERS INSURANCE COMPANY**

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 147,229

**ORDER**

**ON** the 14th day of December, 1993, the application of the Kansas Workers Compensation Fund, and cross applications by respondent and claimant for review by the Workers Compensation Appeals Board of the Award of Administrative Law Judge John D. Clark dated November 16, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

The claimant appeared by and through her attorney, J. Joseph Weber, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, William L. Townsley, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Orvel B. Mason, of Arkansas City, Kansas. There were no other appearances.

**RECORD**

The Appeals Board adopts and considers for purpose of this appeal the same record as that considered by the Administrative Law Judge listed in his Award of November 16, 1993.

**STIPULATIONS**

The Appeals Board adopts those stipulations listed in the Administrative Law Judge's Award of November 16, 1993.

**ISSUES**

The issues presented for consideration before the Appeals Board were:

- (1) Whether the appeal was timely filed;
- (2) Nature and extent of claimant's disability;
- (3) Whether all or any portion of this award should be assessed against the Kansas Workers Compensation Fund;
- (4) Whether claimant is entitled to unauthorized and future medical;

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- (1) The appeal was timely filed.

Respondent argues that the appeal of the Kansas Workers Compensation Fund was not filed within the required time limit. Pursuant to K.S.A. 44-551, appeals to the Appeals Board are to be made by written request within ten days. Director's Rule 51-17-1 provides that time is to be calculated by excluding the first day and including the last. The Rule further provides that if the last day is on Saturday or Sunday it shall be excluded. Director's Rule 51-18-2 provides that the effective date of the award is one day after the date shown in the award. In this case the date shown on the award is November 16, 1993. That makes the award effective November 17, 1993. The count begins on November 18, 1993, and would end on Saturday, November 27, 1993. Monday, November 29, 1993, was therefore the last date for filing the appeal and that is, in fact, the date the Kansas Workers Compensation Fund's application was received in the Wichita office. Once appealed, all issues are open for consideration. The appeal was, therefore, timely filed.

- (2) Claimant is entitled to benefits for a twenty-two percent (22%) permanent partial general disability.

Claimant was initially injured on May 18, 1990, when she fell from her truck at a truck stop in Grants, New Mexico. She sought medical care when she returned to Salina. She thereafter continued to drive with increased pain until June 30, 1990, when she became unable to get back into her truck. Although Dr. Duane Murphy concluded she could return to work, the Appeals Board finds more convincing the testimony of Dr. Kruckemyer that she should not return to her previous work duties as a truck driver.

From restrictions recommended by Dr. Kruckemyer, Mr. Jerry D. Hardin concluded and testified that claimant's ability to obtain work in the open labor market had been reduced by twenty-two percent (22%). He further testified that her ability to earn a comparable wage had been reduced by seventy-two percent (72%). Having considered both wage loss and loss of access to the open labor market as required by Schad v. Hearststone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Appeals Board concludes that it is, as the Administrative Law Judge suggested, appropriate to rely in this case upon the twenty-two percent (22%) loss of access factor. Claimant has several unrelated factors affecting her ability to obtain employment. She has a history of other serious health problems which include Lou Gehrig's Disease, myositis ossificans, and a history of use of pain medications as recently as a few months prior to this accident. The Appeals Board therefore finds the twenty-two percent (22%) loss of access to the open labor market to be the more appropriate measure of the work disability in this case.

(3) Fifty percent (50%) of the award is assessed against the Kansas Workers Compensation Fund.

Claimant was originally injured May 18, 1990. She reported the accident to her employer and continued thereafter to drive with increased symptomatology. Following the May 18, 1990 injury, she was treated by physicians authorized by the respondent. Dr. Murphy testified that of her current disability, fifty percent (50%) resulted from the May 18, 1990 accident, and that the work thereafter contributed fifty percent (50%) to her total disability. Under the circumstances, the Appeals Board concludes that the respondent employer did have knowledge of a "handicap." The Appeals Board further finds based upon the credible evidence presented that the preexisting handicap contributed fifty percent (50%) to the total resulting disability. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987); Carter v. Kansas Gas & Electric, 5 Kan. App. 2d 602, 621 P.2d 448 (1980). See also Desbien v. Key Milling Co., 3 Kan. App. 2d 43, 588 P.2d 482 (1979).

(4) The Appeals Board finds that upon proper presentation of unauthorized medical expenses incurred, claimant is entitled to unauthorized medical expenses up to the statutory limit. Future medical expenses are to be awarded upon proper application to the Director only.

AWARD

**WHEREFORE**, AN AWARD OF COMPENSATION is hereby made in favor of claimant, Sylvia G. Nixon, with fifty percent (50%) against the respondent and fifty percent (50%) against the Kansas Workers Compensation Fund for an accidental injury sustained on May 18, 1990 and continuing thereafter through June 30, 1990. Her average weekly wage is stipulated to be \$709.62. As a result of claimant's accidental injury, she is entitled to 54 weeks temporary total disability at the rate of \$271.00 per week or \$14,634.00 followed by 361 weeks at \$104.08 or \$37,572.88 for a twenty-two percent (22%) permanent partial general body disability making a total award of \$52,206.88.

As of February 4, 1994, there would be due and owing to the claimant 54 weeks temporary total compensation at \$271.00 per week in the sum of \$14,634.00 plus 134 weeks permanent partial compensation at \$104.08 per week in the sum of \$13,946.72 for a total due and owing of \$28,580.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$23,626.16 shall be paid at \$104.08 per week for 227 weeks or until further order of the Director.

Medical expenses incurred by claimant as a result of her accidental injury shall be awarded to be paid fifty percent (50%) by the respondent and fifty percent (50%) by the Kansas Workers Compensation Fund.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed fifty percent (50%) against the respondent and fifty percent (50%) against the Kansas Workers Compensation Fund, to be paid directly as follows:

OWENS BRAKE & ASSOCIATES	
Deposition of Heidi Loomis, Dated January 23, 1992	\$ 239.65
Deposition of Alan L. Kruckemyer, M.D., Dated January 23, 1992	\$ 310.10
Deposition of Heidi Loomis, Dated August 6, 1992	\$ 200.89
Deposition of Debbie Schmidtberger, Dated August 6, 1992	\$ 99.78
TOTAL	\$ 850.42
KELLEY, YORK & ASSOCIATES, LTD.	
Deposition of Duane A. Murphy, M.D., Dated August 31, 1992	\$ 205.43
Deposition of Jerry D. Hardin, Dated April 10, 1992	\$ 341.85
Transcript of Regular Hearing, Dated April 28, 1992	\$ 455.30
TOTAL	\$1002.58
BARBER & ASSOCIATES	
Transcript of Regular Hearing, Dated February 12, 1992	\$ 173.95
IRELAND AND BARBER	
Transcript of Preliminary Hearing, Dated October 29, 1991	\$ 136.35

**SYLVIA G. NIXON**

**5**

**DOCKET NO. 147,229**

COURT REPORTING SERVICE  
Transcript of Preliminary Hearing,  
Dated August 21, 1990

\$ 109.75

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

cc: J. Joseph Weber, P.O. Box 1080, Wichita, Kansas 67201-1080  
William L. Townsley, P.O. Box 997, Wichita, Kansas 67201  
Orvel B. Mason, P.O. Box 739, Arkansas City, Kansas 67005  
John D. Clark, Administrative Law Judge  
George Gomez, Director